

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

FIBER TECHNOLOGIES NETWORKS, INC.

Petition for Preemption Pursuant to Section 253
Of the Communications Act of Discriminatory
Ordinance, Fees and Right-of-Way Practices of the
Borough of Blawnox, Pennsylvania

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) DA03-376
) WC Docket No. 03-37
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**INITIAL COMMENTS OF NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE
OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL
ASSOCIATION OF COUNTIES, THE INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION AND THE PENNSYLVANIA LEAGUE OF CITIES AND
MUNICIPALITIES**

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Dated: March 31, 2003

SUMMARY

There are multiple reasons why it is inappropriate and legally improper for the Commission to preempt the Borough of Blawnox, Pennsylvania (“Blawnox” or the “Borough”) ordinance under 47 U.S.C. §253. Fiber Technologies Networks, Inc. (“Fiber Tech”) has alleged in the first instance that the ordinance violates Pennsylvania law. The Commission should defer to a court of competent jurisdiction in the Commonwealth of Pennsylvania to make this determination before addressing preemption under federal law.

The challenged ordinance addresses issues relating to the management of local rights of way, and the requirement that private entities pay fair and reasonable compensation for the use of those rights of way. The legislative history of §253 of the Telecommunications Act of 1996 makes it clear that the Commission has no jurisdiction to preempt local regulations relating to management of the rights of way and the charging of fair and reasonable compensation for use of the rights of way by telecommunications companies.

Fiber Tech’s petition is wholly lacking in competent evidence sufficient to support a finding that the requirements of the Borough’s ordinance have the effect of prohibiting its ability to provide telecommunications services. Fiber Tech has not provided the credible evidence in support of its petition, as required by the Commission’s 1998 Guidelines for Petitions for Ruling Under §253 of the Communications Act.

To date, there has been no Commission decision in connection with any preemption petition, rulemaking, or other proceeding, regarding a definition of “fair and reasonable compensation,” as that term is utilized in §253(c). As stated previously, the Commission has no jurisdiction to preempt local rights of way regulations based upon whether the compensation charged is fair and reasonable under 253(c). However, should the Commission determine that it does have legal authority to consider preemption of this ordinance; it should not use this proceeding as a platform to define the scope of “fair and reasonable compensation.” The

Commission is well aware that this issue is of vital importance to local governments, state governments, and the industry. Assuming for the sake of argument that the Commission has jurisdiction to determine whether a local regulation falls within the safe harbor of §253(c), it should only do so after defining the scope of “fair and reasonable compensation” in a broader based proceeding, which, consistent with the Administrative Procedures Act, allows substantially more time for notice to affected communities and the industry, and only after affording all interested parties nationally a longer period of time in which to submit comments and other input to the Commission.

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ASSOCIATION, AND THE PENNSYLVANIA LEAGUE OF CITIES AND
MUNICIPALITIES**

The National Association of Telecommunications Officers and Advisors (“NATOA”), National League of Cities (“NLC”), United States Conference of Mayors (“USCM”), the National Association of Counties (“NACo”), International Municipal Lawyers Associations (“IMLA”), and the Pennsylvania League of Cities and Municipalities (“PLCM”) (collectively referred to as “the Local Governments”) respectfully submit these comments in opposition to the Petition for Preemption pursuant to §253, filed by Fiber Technologies Networks, L.L.C. (“Fiber Tech”) against the Borough of Blawnox, Pennsylvania (“Blawnox” or “the Borough”).

NATOA is a national association that represents the telecommunications needs and interests of local governments, and those who advise local governments. The membership is predominantly composed of local government agencies, local government staff and public officials, as well as consultants, attorneys, and engineers who consult local governments on their telecommunications needs. NLC is the oldest and largest national organization representing

municipal governments throughout the United States. NLC serves as a national resource to and an advocate for the more than 18,000 cities, villages, and towns it represents.

USCM is the official nonpartisan organization of cities with populations of 30,000 or more.

There are 1,183 such cities in the country today. NACo is the only organization representing county governments in the United States. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population. IMLA is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935.

It is the legal voice for the nation's local governments, and serves as a clearinghouse of local law information for its more than 1,400 members. PLCM is a nonprofit, nonpartisan organization established in 1900 as an advocate for Pennsylvania's cities and urban municipalities. Today, the Board of Directors oversees the administration of a wide array of municipal services including legislative advocacy, publications, education/training, consulting-based programs, and group insurance trusts. NATOA, NLC, USCM, NACo, IMLA and PLCM members own or manage, and advise those who own or manage, local rights of way.

I. THE COMMISSION SHOULD NOT CONSIDER FEDERAL PREEMPTION, AS THE MATTER CAN BE DETERMINED UNDER STATE LAW.

Fiber Tech alleges that the ordinance violates Pennsylvania law. It is not the Local Governments' intention to argue whether Fiber Tech's allegation is correct. However, the state law issues *can* and *should* be determined conclusively before preemption under federal law is considered.

Fiber Tech cites two Pennsylvania cases, which it claims supports the argument that the ordinance is inconsistent with state law. *Pennsylvania Power and Light Co. v. West Mahanoy Township*, 33 Pa. D. & C.2d 268 (1963) preempted a municipal ordinance that regulated the installation of poles in public rights of way and charging an annual license fee for each. The court held that the Pennsylvania Department of Highways had exclusive jurisdiction to determine

whether poles should be erected in Township highways. The court noted that the Township's ordinance did not distinguish between poles erected along state highways versus poles erected along Township roads. Likewise, the Blawnox ordinance applies to facilities in "public ways" as that term is defined in the ordinance, and the Borough is imposing its rights of way fees for the use of facilities in state owned rights of way within municipal boundaries.

In *Bell Telephone Co. of Pennsylvania v. Bristol Township*, 54 Pa D. & C.2d 419 (1971), the court preempted a Township ordinance that imposed a license fee on poles erected in the public rights of way within the Township. The court concluded that the Pennsylvania Public Utilities Commission had exclusive jurisdiction relating to poles in the public rights of way.

Pennsylvania statutory law may also be relevant to this issue, although not cited in Fiber Tech's Petition. 15 Pa. C.S.A. §1511(e) provides that a public utility corporation has a state granted "right to enter" streets, highways and other public ways for various purposes, including "the placement, maintenance and removal of aerial, surface and subsurface public utility facilities thereon or therein."¹ The statute requires the companies to obtain permits from the local jurisdiction, but does not authorize other compensation.

In addition, Pennsylvania law covering the corporate power of boroughs contains a provision that requires license fees for poles and wires to be reasonable, and includes annotations to cases suggesting what is considered reasonable under state law.² It is not clear under Pennsylvania statute whether additional revenues can be raised from telecommunications companies utilizing public rights of way. However, *Bell Telephone Co. v. Hazelton*, 67 Pa. Super 264, 270 (Pa. Super Ct. 1917), and the cases cited in the annotation to 53 Pa. C.S.A. §46202 suggest that license or rights of way fees must be directly related to the municipality's

¹ PA ST 15 Pa. C.S.A. §1511(e).

² PA ST 53 Pa. C.S.A. §46202. The annotation cites *Western Union Telegraph Co. v. New Hope Borough*, 23 S. Ct. 214, 187 U.S. 419, 47 L. Ed. 240 (1903), affirming *New Hope Borough v. Telegraph Co.*, 16 Pa. Super. 306; *Postal Telegraph Cable Co. v. New Hope*, 24 S. Ct. 204, 192 U.S. 55, 48 L. Ed. 338 (1890), and other cases.

actual costs incurred in regulating the use of its rights of way, and should not be a vehicle for raising revenues.³

This dispute between Fiber Tech and the Borough of Blawnox can be resolved through an interpretation of Pennsylvania law. Fiber Tech raised the issue of state law, and argues that the decision can be made pursuant to state law. Fiber Tech should have filed this matter in state court. Clearly, the Commission is not the appropriate body to make this state law determination. It should defer the matter for resolution to the state court in Pennsylvania.

II. THE COMMISSION DOES NOT HAVE JURISDICTION TO PREEMPT THIS ORDINANCE.

The legislative history of 47 U.S.C. §253 (Removals of Barriers to Entry) makes it clear that Congress intended to promote the competitive deployment of telecommunications systems and services while preserving the traditional rights of way management responsibilities of state and local governments. 47 U.S.C. §253 states:

- (a) *In general* -- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
- (b) *State Regulatory Authority* – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
- (c) *State and Local Government Authority* – Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

³ Id., citing *Delaware and Atlantic Telegraph and Telephone Co., Petition*, 224 Pa. 55 (Pa. 1909); *See also*, annotation cited in FN 2.

(d) *Preemption* – If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such state, regulation or legal requirement to the extent necessary to correct such violation of inconsistency.

Subsection (a) is a general prohibition against regulations that prohibit or have the effect of prohibiting the provision of telecommunications services, and will be discussed in more detail in Section III of these Comments. Subsection (b) is a safe harbor that protects state action such as the ability to impose universal service requirements and consumer protection regulations. Subsection (c) is a safe harbor protecting state and local (i) rights of way management authority and (ii) the right to recover compensation for private use of public rights of way. Subsection (d) creates authority for the Commission to determine whether regulations violate subsection (a), or fall within subsection (b)’s safe harbor. Even if the Commission were to find that the ordinance violates subsection (a) (which we argue it does not in Section III below), it is for the courts, and not this Agency to decide whether the ordinance addresses rights of way management and/or compensation issues, and thus falls within the safe harbor of subsection (c).

The precursors of the Telecommunications Act of 1996, H. R. 1555 and S. 652 were both introduced in 1995. The House bill did not contain any preemption provision. The language that became subsection 253(d) was added in Conference, and based upon §254(d) of S.652.⁴ The original language of §254(d) of S.652 *required* Commission preemption of any state or local government “statute, regulation, or legal requirement that violates or is inconsistent with this section . . .” After substantial debate, Senator Gorton (R-WA) offered a compromise amendment that was intended to preserve state and local authority over management of and compensation for the use of public rights of way. The compromise offered by Senator Gorton clarified that the

⁴ H.R. Conf. Rep. No. 458, 104th Cong., Second Sess. 126-27 (1996).

Commission's preemption authority under subsection (d) extended only to matters covered in subsections (a) and (b). Senator Gorton stated:

There is no preemption . . . for subsection (c) which is entitled "Local Government Authority," and which preserves to local governments control over their public right of way. It accepts the proposition from [Senators Feinstein and Kempthorne] that these local powers should be retained locally, and that any challenge to them take place in the federal district court in that locality and that the Federal Communications Commission should not be able to preempt such actions.⁵

Senator Gorton further stated that his proposal "retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts."⁶ The Gorton amendment was passed unanimously on a voice vote.

On the House side, H.R. 1555 contained comparable prohibition of barriers to entry language in §243(a), provided a safe harbor for requirements that companies obtain construction or similar permits so long as those permits did not effectively prohibit the provision of service in §243(c), and restricted the imposition of any rights of way fees or charges that distinguish between providers of telecommunications services, including the local exchange carrier.⁷ In the floor debate on H.R. 1555, an amendment was offered by Rep. Joe Barton (R-TX) and Rep. Bart Stupak (D-MI), which essentially mirrored the Senate versions of subsections (a) through (c), but did not contain any specific preemption language in subsection (d).⁸ The House adopted the Barton-Stupak amendment by an overwhelming vote of 338-86.⁹ Rep. Barton noted:

[The Amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that right of way . . . the Chairman's amendment has tried to address this problem. It goes part

⁵ 141 Cong. Rec. S.8213 (Daily Ed. June 13, 1995) (Remarks of Sen. Gorton).

⁶ 141 Cong. Rec. S.8308 (Daily Ed. June 14, 1995) (Remarks of Sen. Gorton).

⁷ H.R. 1555, 104th Cong. §243 (1995).

⁸ 141 Cong. Rec. H.8460-61 (Daily Ed. Aug. 4, 1995).

⁹ 141 Cong. Rec. H.8477 (Daily Ed. Aug. 4, 1995).

of the way but not the entire way. The Federal Government has absolutely no business telling State and local government how to price access to their right of way.¹⁰

That Congress further intended to limit Commission authority and reject any implied preemptive authority over local and state government is set forth in 47 U.S.C. §601(c)(1), which states:

NO IMPLIED AFFECT – This Act and the amendments made by this Act shall not be construed to modify, impair, or supercede Federal, State or local law unless expressly so provided in such Act or amendments.

The Conference Report explains:

The Conference Agreement adopts the House provision [under §601] stating that the bill does not have any effect on any other Federal, State or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws.¹¹

The legislative record from both the House and the Senate, together with the Conference Report, clearly indicates that authority addressing access to and compensation for the use of public rights of way was reserved to state and local government, and the Commission has no jurisdiction to consider preemption of state or local regulations in this regard. Rep. Stupak reiterated this conclusion in his letter to the Chairman Powell dated October 8, 2002, which was sent in connection with the Commission's Rights of Way Forum held October 16, 2002. A copy of that letter is attached as Exhibit A.

¹⁰ Id. at H.8460.

¹¹ H.R. Conf. Rep. No. 458, 104th Cong. Second Sess., 201 (1996).

III. FIBER TECH HAS NOT PRESENTED EVIDENCE PROVING THAT THE ORDINANCE CONSTITUTES A PROHIBITION OF ITS ABILITY TO PROVIDE SERVICES.

As stated in Section II of these Comments, the fact that the ordinance requires compensation for the private use of the public right of way, and that it involves management of rights of way, takes this dispute outside of the Commission's jurisdiction. However, should the Commission believe that it has jurisdiction to rule on the preemption petition, and without conceding their argument on this point, the Local Governments allege that Fiber Tech has not presented a factual basis upon which a finding can be made that the ordinance should be preempted.

Fiber Tech has the burden of proving that the Borough's ordinance has the effect of prohibiting its ability to provide telecommunications services. The Commission has identified guidelines for the kind of information that ought to be presented with petitions for preemption under §253, noting specifically that "factual allegations should be supported by credible evidence, including affidavits, and, where appropriate, studies or other descriptions of the economic effects of the legal requirement that is the subject of the petition."¹² Fiber Tech's petition falls far short of advancing competent evidence to meet its burden. The Commission is obligated to insure that evidentiary burdens are met with credible evidence before it considers preempting an area of traditional local government control.

Fiber Tech has not identified what specific telecommunications services it is effectively prohibited from providing, nor has it identified actual or potential customers who are being denied access to the services.¹³ Moreover, with respect to the Commission's guidelines, Fiber

¹² Suggested guidelines for petitions for ruling under §253 of the Communications Act, FCC 98-295, released: November 17, 1998, Section A; 13 FCC Red at 22971-72.

¹³ Id., Section B.

Tech has not suggested “the least intrusive action necessary to correct the alleged violation of Section 253.”¹⁴

Fiber Tech alleges that the annual recurring rights of way fee approximates the cost of installing its aerial facilities in the Borough. The Commission should ask two questions. The first is “Why is this relevant?” The issue is not whether the fee is \$1, \$100, or \$100,000, or whether it is less than, equal to, or greater than the cost to install facilities. The issue is whether payment of the fee for occupation of the rights of way has the effect of prohibiting Fiber Tech’s ability to provide telecommunications services. Fiber Tech makes a completely unsubstantiated allegation that all jurisdictions in metropolitan Pittsburgh will require a comparable fee if the Borough’s ordinance stands. Even if one assumes that allegation is valid, does it prove a prohibition of the ability to provide services? The best that can be said about these claims is that the ordinance makes it more costly to do business than if Fiber Tech did not have to pay the rights of way fee. Section 253(a) does *not* prohibit local regulations that make it more costly to provide telecommunications services.

The second question the Commission should ask is, “Where’s the evidence?” Fiber Tech’s petition is woefully deficient in presenting evidence to support the allegation that this ordinance constitutes a prohibition of its ability to provide telecommunications services. After reading the petition, all the Commission can know for certain is that the ordinance has the effect of requiring Fiber Tech to pay \$8900.00. How does that \$8900.00 charge impact Fiber Tech’s bottom line? Where are Fiber Tech’s audited financial statements? Where is its business plan? Where are the documents to support the actual cost of Fiber Tech’s doing business under the ordinance, the amount of revenue it expects to receive from customers, and its projected profit margin?

¹⁴ Id., Section B(5).

Did Fiber Tech declare dividends last year? Did it pay bonuses to its officers? Where did it buy its materials? Could it have made a better deal? Could it have saved money on its agreements with contractors? Before anyone can conclude that this ordinance has the effect of prohibiting Fiber Tech's ability to provide telecommunications services, the specific impact of the ordinance must be considered *together with all other financial costs of doing business*.

Again, the Commission's guidelines indicate that the Petitioner should describe "with particularity" how this ordinance has the affect of prohibiting its ability to provide services.¹⁵ In numerous decisions, this Commission has refused to find a violation of §253(a) when it has not been presented with credible and probative evidence.¹⁶ Federal courts have likewise refused to preempt when the claims were little more than allegations contained in the pleadings.¹⁷ There has been no credible evidence presented that would indicate how this ordinance has the affect of prohibiting the ability of Fiber Tech to provide service or "whether price levels in the market preclude recovery of any such additional costs."¹⁸

The Commission's rules do not provide for discovery. The Borough cannot request the documentation that would either support or refute Fiber Tech's unsubstantiated claims. It cannot depose Fiber Tech's officers and seek sworn testimony regarding how this ordinance has the effect of prohibiting the ability to provide services, in light of Fiber Tech's other costs of doing business. However, the Commission can demand this information. And the Commission must not give serious consideration to any argument that the ordinance amounts to a §253(a)

¹⁵ Id., Section B(3)(b).

¹⁶ *In the Matter of California Payphone Association*, 12 FCC Rcd 14191 (1997); *In the Matter of TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21440 (1997); *In the Matter of American Communications Services, Inc., MCI Telecommunications Corp.*, 14 FCC Rcd. 21,579, para. 38 (1999).

¹⁷ *Qwest Communications Corp. v City of Berkeley*, 208 F.R.D. 288 (N.D. Cal. 2002); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F.Supp.2d 631, 636 (D.N.J.2001); *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F.Supp.2d 1261, 1281 (S.D.Ala.2001)

¹⁸ Suggested guidelines for petitions for ruling under §253 of the Communications Act, *supra*.

prohibition without first demanding and receiving all relevant evidence necessary to prove the allegation.

IV. THE COMMISSION MUST NOT USE THIS PROCEEDING TO MAKE A DETERMINATION OF THE SCOPE OF FAIR AND REASONABLE COMPENSATION.

The Commission has never formally ruled on the scope of “fair and reasonable compensation.” The Commission is well aware that this is a national issue of great importance to Federal, State and local governments, and the telecommunications industry. While the Local Governments urge that the Commission lacks jurisdiction to make this determination, if the Commission does decide that it has jurisdiction to define that statutory term, this is not the proceeding in which to announce it.

The Commission has a myriad of options available to it in responding to Fiber Tech’s petition. Some, like deferring to the state court, acknowledging the lack of jurisdiction under §253(d), and finding no evidence to support a §253(a) prohibition, have been addressed in these Comments. Others exist as well. At a minimum, however, the Commission should not attempt to make any determination about the meaning of “fair and reasonable compensation” under §253(c).

This proceeding involves a dispute between a small suburban community and a competitive local exchange carrier. The Public Notice announcing this proceeding provided interested parties thirty-two (32) days to file comments¹⁹, and fifteen (15) days to file reply comments after the comment-filing deadline. Assuming for the sake of argument that the plain meaning of “fair and reasonable compensation” does not apply (and despite the clear legislative history of §253(c) reflecting no Commission jurisdiction), should the Commission choose to

¹⁹ Subsequently, a two week extension was granted by the Wireline Competition Bureau.

make a determination addressing this issue, it must provide separate notice and consider the issue in a broader proceeding.

The Administrative Procedures Act requires that federal agencies provide notice of proposed rule making, except interpretive rules, in the Federal Register.²⁰ Defining the terms “fair and reasonable compensation” involves the Commission’s legislative power. “The central question [in determining whether a rule is legislative or interpretive] is essentially whether an agency is exercising its rule-making power to clarify an existing statute or regulation, or to create new law, rights, or duties in what amounts to a legislative act.”²¹ While at first blush defining terms that Congress has left undefined may seem to be interpretive, the Commission will actually be engaged in legislative activity. Defining “fair and reasonable” will either alter the duties of local governments in formulating ordinances and procedures regarding the governance of their rights of way or will alter the rights of telecommunications companies. Rules that have a “future effect” on a party before the agency trigger the APA notice requirement.²² In addition, “when an agency changes the rules of the game, . . . more than a clarification has occurred.”²³ As such, formal notice must be provided in the Federal Register.

Other than publishing notice, the Commission has taken no formal action to notify the wide range of interested parties nationally who would likely want to participate in a proceeding where the Commission is called upon to provide definition and interpretation to this undefined statutory term. Both fundamental fairness and good public policy require that if and when the Commission determines it is necessary to definitively address this issue, it only do so in a proceeding where the Commission and its staff go to great lengths to notify a wide range of

²⁰ 5 U.S.C. 553 (c).

²¹ *White v. Shalala*, 7 F.3d 296, 303 (2nd Cir. 1993).

²² *Sprint Corp., v. Federal Communications Commission*, 315 F.3d 369, 373 (D.C. Cir. 2003) (citing *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 95-96 (D.C.Cir.2002)).

²³ *Sprint Corp., v. Federal Communications Commission*, 315 F.3d 369, 375 (D.C. Cir. 2003).

interested parties, and substantial time be provided for those parties to provide comprehensive, meaningful input.

V. CONCLUSION

As Fiber Tech has alleged, state law ought to control the decision in this matter. The Commission should defer making any decision and allow the matter to be determined by a Pennsylvania court under that state's law. If the Commission is not willing to defer the matter to a Pennsylvania court, it must recognize the clear and unambiguous language of Section 253, and the equally clear legislative history. The Commission simply does not have any authority granted by the Communications Act to preempt a local ordinance that relates to management of the public rights of way or involves compensation for the use of the rights of way. The petition should be dismissed for lack of jurisdiction.

If the Commission insists that it has jurisdiction despite the legislative history of the statute, it must find that Fiber Tech has not presented credible evidence to support a violation of §253(a). The petition does not come close to presenting the kind of credible evidence suggested in the Commission's own guidelines.

Finally, if the Commission does proceed to make a substantive ruling on this petition, it must do so on grounds other than a determination of whether the compensation required by Blawnox is fair and reasonable. At such time as the Commission may decide to definitively address the issue of fair and reasonable compensation, it should only do so in a broader based proceeding, after a far greater effort to provide notice to interested parties consistent with the APA, and only after providing a longer and more reasonable time for interested parties to respond.

Respectfully submitted this 31st day of March, 2003.

NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS
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STATES CONFERENCE OF MAYORS
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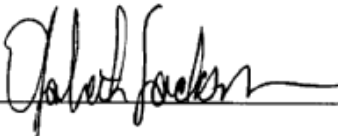
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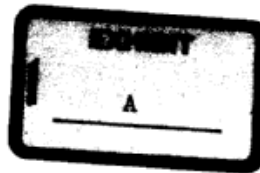
I hereby certify that on the 31st day of March, 2003, I served a copy of the foregoing on the persons listed below by depositing a copy of same in the U.S. Mail, first class postage prepaid addressed as follows:

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Congress of the United States

House of Representatives

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October 8, 2002

POWERED
ENERGY AND COMMERCE
RECOMMENDATIONS
HOUSE
TELECOMMUNICATIONS AND THE
FEDERAL
OVERSIGHT AND INVESTIGATION
ON OVERSIGHT
COMMUNICATIONS LAW
SOLUTIONS GROUP
DEPUTY WIFE

CHAIRMAN MICHAEL K. POWELL
FEDERAL COMMUNICATIONS COMMISSION
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Dear Chairman Powell:

I understand that you will be holding a public forum on rights-of-way issues on October 16. I am writing to express my strong opposition to any rule-making that the Federal Communications Commission may be contemplating on this issue. This forum must not lead to an effort to weaken the current authority of states or municipalities to manage the public rights-of-way and require compensation for their use.

I have been very active on this issue for some time, and during the debate on the 1996 Telecommunications Act, I offered an amendment to preserve the authority of local governments to control behavior in the public rights-of-way and to receive fair compensation for use of public property by commercial enterprises. Without the amendment, the bill would have raised serious concerns regarding unfunded mandates, federal intrusion into local authority, and unfair taxpayer burdens. My amendment passed the House, and provisions on this issue were ultimately included in the final Act.

Congress has definitively stated its intent that states and municipalities should have authority over these issues, and I do not believe that further federal regulation is warranted.

I thank you for your consideration of this matter, and ask that you keep me informed of any actions that the FCC intends to take regarding rights-of-way authority.

Sincerely,

Bart Stupak

BART STUPAK
Member of Congress

BTS/dp

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